Before the
Federal Communications Commission
Washington, D.C. 20554

Implementation of Section 304 of the Telecommunications Act of 1996	)	**CS Docket No. 97-80**
Commercial Availability of Navigation Devices	)	
Compatibility Between Cable Systems and Consumer Electronics Equipment	)	**PP Docket No. 00-67**

PETITION FOR RECONSIDERATION OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

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THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") respectfully requests that the Commission reconsider several aspects of its recent "Plug & Play Order"[1] that may have unintended negative consequences. In particular, and as explained further below, the MPAA requests that the Commission reconsider its decision with respect to four issues. First, the Commission should require that the *capability* for selectable output control be built into devices so as to make possible its use under those circumstances the Commission has already suggested could be appropriate, and in other circumstances the Commission hereafter decides to permit. Second, the Commission should reconsider its decision to depart from the December 19, 2002 Cable-CE Memorandum of Understanding (the "MOU")[2] and other private agreements in designating Subscription Video on Demand ("SVOD") as an Undefined Business Model, and definitively allow SVOD content to be encoded as restrictively as "Copy Never." Third, the

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[1] *See* Second Report and Order and Second Further Notice of Proposed Rulemaking, *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, C.S. Docket No. 97-80, P.P. Docket No. 00-67, FCC 03-225 (rel. Oct. 9, 2003) ("Plug & Play Order").

[2] *See* Letter from Carl E. Vogel, President & CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (Dec. 19, 2002) (attaching Memorandum of Understanding).

Commission should simplify the procedures for announcing and challenging the launch of an Undefined Business Model to make them less onerous on content owners, MVPDs, and the Commission itself. Finally, the Commission should clarify that Section 76.1908(a) does not abrogate any contractual obligations MVPDs may have entered into.

I. The Commission Should Revise the Plug and Play Order to Require Implementation of Selectable Output Control Capability and Permit Its Use in Certain Circumstances

As part of the Plug & Play Order, the Commission adopted new Section 76.1903, which prohibits MVPDs from "attach[ing] or embed[ding] data or information with Commercial Audiovisual Content, or otherwise apply[ing] to, associat[ing] with, or allow[ing] such data to persist in or remain associated with such content, so as to prevent its output through any analog or digital output authorized or permitted under license, law or regulation governing such Covered Product." 47 C.F.R. § 76.1903. The Commission did not rule out selectable output control entirely, however. The Commission concluded that "selectable output control functionality might have future applications that could potentially be advantageous to consumers, such as facilitating new business models," and agreed to consider "waivers, petitions and other proposals" to use selectable output control in the future. Plug & Play Order ¶ 61. The Commission also explicitly noted that it was not banning the "inclusion in devices of the *capability* to exercise selectable output control," but only "the current *use* of such capability by MVPDs." *Id.*

The Commission's waiver or petition procedure will allow MVPDs, content owners, and others to demonstrate to the Commission specific applications of selectable output control that should be permitted. However, in practice, there will be a major difficulty with this procedure even in those circumstances where the Commission has indicated selectable output control may be warranted. That is, while the Commission that selectable output control is appropriate for use

with new business models in the future, the current rule generates no impetus nor offers any particular incentive to manufacturers to spend the modest additional amount necessary to build such capability into devices. Given the well documented opposition of the Consumer Electronics ("CE") industry to selectable output control, it seems extremely unlikely that CE manufacturers would voluntarily incorporate selectable output control into their devices. We therefore urge the Commission to reconsider its order and adopt an alternative approach that *requires* the capability for selectable output control be included in Plug & Play devices under the Commission's supervisory authority over the DFAST license.[3]

In addition to facilitating the implementation of such new business models that are dependent on selectable output control as the Commission may hereafter decide to permit, requiring the installation of selectable output control capability would also allow the Commission to react quickly to unforeseen problems with certain outputs. For example, a court, responding to intellectual property, security, or other concerns, may order the termination of a certain kind of output. If no means exist to turn that output off, entire devices or services would have to be disabled instead. *See, e.g.*, Digital Transmission Protection License Agreement, Adopters Agreement ("DTLA Adopters Agreement") ¶ 4.2.3 (authorizing revocation if required by "the National Security Agency, court order, or other competent government authority"). Or, a holder of patents in an authorized digital output protection or secure recording technology may attempt to impose licensing obligations on MVPDs, content owners, or others without their consent merely because content is transmitted over an output protected with that technology, or

[3] The Commission rejected selectable output control as a means of addressing insecure outputs, reasoning that there are other methods to handle compromises of digital outputs and the issue of the analog hole. *See* Plug & Play Order ¶ 60. While the MPAA respectfully disagrees with this decision, Commission oversight of selectable output control as set forth above for uses that the Commission decides to permit would be acceptable to the MPAA, pending an evaluation of how the system works in practice, and reserving the right to petition the Commission to amend Section 76.1903 if circumstances warrant.

merely because encoding in the content invokes such technology. *See* Comments of the MPAA at 9 ("Subpart W would require content providers and MVPDs to allow the output of video content over any analog or digital output permitted by law, regardless of the . . . license terms associated with the technology protecting that output, and regardless of whether the content provider had ever agreed to deliver content via such an output.") Indeed, it is not inconceivable that a patent holder in one or more authorized digital output protection or secure recording technologies may claim that patent rights are implicated when an MVPD, programmer, or content owner inserts a signal such as "Copy Never" into content that then causes a device to use an output containing patented technology.[4]

Without the opportunity to prohibit the use of such outputs in these circumstances, MVPDs, content owners, and others may potentially be subjected to royalty claims and expensive litigation – possibly from multiple technology owners – that they could not avoid without forgoing protection of all of their content. The Commission should not force this Hobson's choice. The Commission should revise its Plug & Play Order to require that the capability for selectable output control be built into Plug & Play devices, and to permit its use in at least the circumstances identified above, as well as in other circumstances to be identified and decided upon by the Commission in the future.

II. The Commission Should Reconsider Its Determination to Classify SVOD as an Undefined Business Model

The Cable-CE MOU proposed to allow three business models to be marked as restrictive as "Copy Never," should the applicable content provider so desire and so negotiate with its

[4] As of the date of this filing, the MPAA is not aware of any such patents or of any such patent claims being made. By raising this argument before the Commission, the MPAA is of course not conceding the validity of any future patent claim and is not waiving any arguments that could be raised in the event of any future patent litigation.

licensee(s): Pay-Per-View, Video-on-Demand ("VOD"), and Subscription-Video-on-Demand ("SVOD"). The Commission, on the other hand, decided to permit the encoding of the first two business models as restrictively as "Copy Never," but decided to classify SVOD as an Undefined Business Model, in order to "allow[ ] SVOD to more fully develop as a program offering in the marketplace and . . . afford MVPDs more flexibility in the encoding of different forms of this service." Plug & Play Order ¶ 74. By making a freely negotiated "Copy Never" encoding rule subject to a "second bite at the apple" in Commission proceedings, the Commission's decision unnecessarily tampers with the unvarying decision of the content distribution marketplace that SVOD requires the full range of possible encoding schemes, up to and including "Copy Never." The effect of the regulation, therefore, is to inject greater uncertainty into content licensing negotiations, generate superfluous announcements in PR Newswire, and produce unnecessary challenges by competitors under the procedures provided in Section 76.1906, all for a business model and encoding scheme that has already been established and has been working well. Far from allowing SVOD "to more fully develop as a program offering" as the Commission intended, the Commission's rule will have the unintended consequence of stifling its development.

The market and the record in this proceeding are clear that VOD content should be allowed to be encoded as "Copy Never." Yet the SVOD business model is very similar to VOD, and in practice, SVOD content can be very similar to VOD content as well. As HBO has demonstrated in this proceeding, SVOD has been used to deliver some of the most valuable content a programmer may have to offer. *See* Reply Comments of Home Box Office, Inc. at 7-8 (filed Apr. 28, 2003). Although not all programmers may choose to use SVOD in this manner, those who do should be allowed to mark their content as "Copy Never."

Any encoding scheme must ultimately be determined by what the market, including

content owners, distributors, device manufacturers, and consumers, will bear.[5] In the case of SVOD, the market has already spoken: the market will bear encodings up to and including "Copy Never." Consumers of several SVOD services willingly pay for such services in large enough numbers to make them economically viable, even where the content is marked as "Copy Never." The 5C license agreement also allows SVOD content to be marked as restrictively as "Copy Never." *See* DTLA Adopters Agreement, Exh. B, Part 2, ¶ 2.1.1.3. While programmers such as Starz may in the future seek to negotiate licenses that require less restrictive encoding for content ─ an option that exists no matter what the encoding rule for SVOD is ─ the market determination for the proper maximum level of protection for SVOD has already been made and should be respected. We therefore urge the Commission to treat SVOD as a Defined Business Model subject to encoding as restrictive as "Copy Never," and to remove it from the Section 76.1906 process.

III. The Commission Should Simplify the Procedures for Announcing and Challenging New Business Models

The regulation adopted by the Commission in the Plug & Play Order contemplates procedures for announcements of the launch of Undefined Business Models and for challenges to the encoding rules set in those Undefined Business Models. The purpose of the procedures is to "provide an appropriate framework" for making determinations of "the appropriate encoding classifications of . . . undefined business models" in a timely fashion "while preserving the opportunity for public notice and comment on the proposed classifications." Plug & Play Order ¶ 72. In adapting rules originally developed in a much different licensing context, however, the

[5] Indeed, the Commission's difficulty in resolving the encoding rule to be applied to SVOD illustrates the larger point that the Commission is not the optimal body to determine the structure of content distribution business models.

Commission may have introduced unintended burdens into the process.

The Undefined Business Model procedures were not original to the MOU. Rather, they were adapted from the Undefined Business Model procedures from the 5C license agreement. *See* Digital Transmission Protection License Agreement, Content Participant Agreement (hereafter "5C Content Participant Agreement") ¶ 5.2. Those procedures require only a single entity – the Content Participant – to issue a press release upon the implementation of an Undefined Business Model, and inform the Digital Transmission Licensing Authority ("DTLA") within 10 days thereafter of the encoding rules to be adopted by the Content Participant for that business model. *Id.* ¶ 5.2(a), (b). If DTLA does not agree with the proposed encoding rule, DTLA and the Content Participant proceed to an arbitration. *See id.* ¶ 5.2(e). The 5C complaint procedures must be invoked "[p]romptly" after the Content Participant's press release. *Id.* ¶ 5.2(d). Thus, the issue would likely be quickly resolved with a single complaint procedure, between two parties, per business model launched by a Content Participant.

The MOU adapted these provisions to the context of a regulation covering only MVPDs and not directly regulating content owners. The MOU essentially substituted MVPDs for Content Participants in the 5C Content Participant Agreement, and replaced DTLA with device manufacturers and other MVPDs. Thus, the MOU proposed a system whereby each MVPD would, upon launching a new business model, have to issue a press release announcing the encoding rules for that model, whereupon manufacturers and other MVPDs would have two years to file a complaint before the Commission. The Commission largely adopted the MOU proposal, but broadened the proposal by permitting challenges from "[a]ny interested party." *See* Plug & Play Order ¶ 72.

As a result of these changes, however, the process is now much more cumbersome than

the equivalent process under the 5C Content Participant Agreement. Content providers are likely to license content according to the same business model to numerous cable and satellite systems. Under the current Plug & Play rules, *each* MVPD launching an Undefined Business Model must issue a press release, which commences a two-year deadline in each instance for any of an unlimited number of "interested parties" to object, even if that same business model has been launched before by dozens of MVPDs. As a result, scores of press releases for the same business model would ensue, each triggering a two-year window for complaints and potentially postponing a final resolution decades into the future. Presumably, if a challenge is filed and the business model successfully defended, the Commission would then reject subsequent challenges to the same business model. However, if no challenge is filed in the first two-year period, the current rules do not afford content providers or MVPDs any certainty that challenges could not be lodged within two years of any future launch on another system of the very same business model.

The MPAA therefore recommends that the Commission amend its rules in two respects in order to alleviate this problem. First, the rules should provide that only the first MVPD with a certain threshold number of subscribers, for example one million, be required to announce the launch of an Undefined Business Model, and that the time period to object commence from that announcement. This would make the procedures more analogous to the original 5C procedures, while still preserving the opportunity for any interested person to object.

Second, the rules should be revised to shorten the time frame to object to new business model launches to within 90 days after a launch announcement by an appropriate MVPD, as two years is excessive in this context. Interested persons would have three months from a launch announcement to object, which should be more than enough time for parties to learn of the new

business model and its encoding rules, and would encourage the prompt resolution of disputes instead of the perpetuation of uncertainty. The elimination of uncertainty in a timely fashion will allow the parties to turn their attention to developing innovative applications of a new business model without fear of that model being overturned as the result of some future proceeding.

IV. The Commission Should Clarify That Section 76.1908(a) Does Not Abrogate Cable or Satellite Owners' Existing Contractual Obligations

Finally, the Commission must clarify that it did not intend in Section 76.1908(a) to abrogate cable or satellite operators' negotiated contracts with content owners with respect to content protection. Section 76.1908(a) provides that:

> Nothing in this subpart shall be construed as prohibiting a Covered Entity from . . . encoding, storing or managing Commercial Audiovisual Content within its distribution system or within a Covered Product under the control of a Covered Entity's Commercially Adopted Access Control Method, provided that the outcome for the consumer from the application of the Encoding Rules set out in §§76.1904(a)-(b) is unchanged thereby when such Commercial Audiovisual Content is released to consumer control.

Plainly, the purpose of this provision is to allow MVPDs more flexibility in handling content before it reaches the consumer. That is, it clarifies that MVPDs may prohibit copying of even "Copy One Generation" content as it travels from the head end to the consumer's home, so long as the content is treated as "Copy One Generation" once it reaches the consumer.

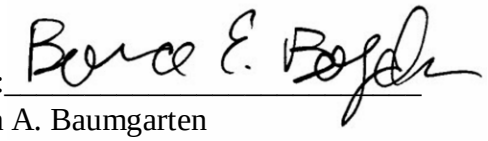
However, the way the regulation is currently drafted, it is possible that an MVPD could interpret the language to permit it to make copies that are not permitted under its agreements with content owners, because such copying may be "within a Covered Product under the control of a Covered Entity's Commercially Adopted Access Control Method." For example, an MVPD may claim that it has the right under Section 76.1908(a) to make copies of "Copy Never" content in consumer devices supplied by the MVPD, as long as the content can still be said to be "within

its distribution system" – for example, a PVR in the consumer's home that receives CA-controlled content before CableCard decryption. Such an interpretation, if allowed to gain traction, would undermine contractual arrangements between content owners and distributors and would create chaos where the Plug & Play rule is intended to bring order. The Commission should therefore modify Section 76.1908(a) by adding a provision at the end: "and provided that all other laws, regulations, or licenses applicable to such encoding, storage, or management shall be unaffected by this section."

CONCLUSION

For the reasons stated above, the MPAA respectfully requests that the Commission revise and clarify its Second Report and Order to (1) require that the *capability* for selectable output control be built into devices so as to make possible its use under those circumstances the Commission has already suggested could be appropriate, and in other circumstances the Commission hereafter decides to permit; (2) allow SVOD content to be encoded as restrictively as "Copy Never;" (3) simplify the procedures for announcing and challenging the launch of an Undefined Business Model; and (4) clarify that Section 76.1908(a) does not abrogate any existing contractual obligations under which MVPDs may be bound.

Respectfully submitted,
MOTION PICTURE ASSOCIATION OF AMERICA, INC.

By: 

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